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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/585,184	06/30/2006	Una Tucker	2204884-120US1	1165
23483 WILMERHALE/BOSTON 60 STATE STREET BOSTON, MA 02109	7590 11/09/2010		<div>EXAMINER</div> <div>MATTER, KRISTIN CLARETTE</div>	
			<div>ART UNIT</div> <div>3771</div>	<div>PAPER NUMBER</div>
			<div>NOTIFICATION DATE</div> <div>11/09/2010</div>	<div>DELIVERY MODE</div> <div>ELECTRONIC</div>

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/585,184

Applicant(s)

TUCKER, UNA

Examiner

KRISTEN C. MATTER

Art Unit

3771

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 02 November 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: By changing the term "plurality" to "four", applicant has narrowed the scope of the claims in a way that would require reconsideration and discussion in the rejection that was not previously required. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 27-31.
Claim(s) withdrawn from consideration: 12-26.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☒ Other: See Continuation Sheet.

/Justine R Yu/
Supervisory Patent Examiner, Art Unit 3771

/Kristen C. Matter/
Examiner, Art Unit 3771

Continuation of 11. does NOT place the application in condition for allowance because: In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Here, McNair teaches the structure of the instant invention was claimed. The limitation of the dome being arched yet sufficiently flattened is a relative term that does not have a set geometry. As seen in Figures 2-3 of McNair, the dome member has a large enough diameter (Figure 2) and ovoid shape (Figure 3) that the arch is somewhat flattened in a way that would provide maximum contact with the body and not point massage for example. Comparing with Figure 5 of the instant application, clearly there are areas on the instant invention that do not contact the dome member in the same manner as the McNair reference, and "maximum contact" is possible with both devices as designed. Also, since both the top and bottom of McNair are sufficiently flattened (see Figures 2 and 3) and the bottom of the device is narrower than the top portion (Figure 3), the device can be considered to be "generally" isosceles trapezoid shape. Likewise, from Figure 3 it appears as though the dome member is longer than the inside of the hand grip. However, York was cited to further support or back up these positions as well, with any modification being a simply change in ornamental design without a change in function that does not patentably distinguish an invention over the prior art.

York, teaches a similar hand held massager that has a body similar to that claimed and taught by McNair. Motivation to combine the main body portion of York with McNair can simply be to have a more comfortable grip, a more compact design to save space, and an even larger surface area for massage. There is nothing structurally in McNair preventing a change in shape and it appears as though McNair would work equally well with such a modification. Such a modification is a mere change in shape without a change in function that does not patentably distinguish an invention over the prior art.

Likewise, Ferrier is cited simply to show finger rings. York shows four finger notches, thus it would have been obvious to have a plurality of finger rings (and four in particular) in the modified McNair device as obvious to try from 3 possible ways of allowing a user to get their fingers in the grip (i.e., one large slot as seen in McNair, notches as seen in York, or rings as seen in Ferrier). Such a modification does not patentably distinguish the invention because it involves the use of a well known grip means in a well known device to yield predictable results. Furthermore, there is nothing structurally in McNair preventing such a modification and McNair would perform equally well with any well known gripping means. Motivation for finger rings can also come from the possibility that finger rings will allow even more force to be applied with the massager or better control particularly when moving the device laterally, for example.

Finally, applicant's arguments regarding Back are unpersuasive because even if Back teaches a "pistol grip" the grip is clearly concave and would have been obvious to use in the modified McNair device because it is a well known comfortable grip used in hand held massagers and there is nothing structurally in McNair preventing such a modification.

Continuation of 13. Other: Examiner notes that the certified copy of the 0330185.0 application filed in the UK has been received.